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No. 93-1709

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NEW ORLEANS 2000 PARTNERSHIP,
Petitioner,

v.

BOARD OF COMMISSIONERS
OF THE NEW ORLEANS EXHIBITION HALL AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, of Louisiana

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REPLY BRIEF OF PETITIONER

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1. Respondent disingenuously seeks to wish away the constitutional infirmity embedded in the process by which petitioner received less than half of the fair market value of its property confiscated by respondent. Like others addressing an argument that is irrefutable, respondent seeks to do so by asserting that the challenge was waived below. This is flatly wrong.

Incredibly, respondent reproduces the questions presented in its appendix, even though questions 6 and 12 in the Court of Appeal brief plainly present the valuation issue presented in the petition. Opp. App. 7a-8a. Apparently, respondent assumed the Court would not bother to review the questions reproduced.

In any event, petitioner clearly presented to the Court of Appeal as an error the failure of respondent "to have

its appraisers conduct *bona fide* appraisals of the property at or near the date of trial valuation." In its brief to the Court of Appeal on that issue, petitioner specifically argued that the trial court violated the holding in *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), by allowing respondent to rely solely upon valuations of the property based on the date of confiscation and not as of the date of trial. Brief of Appellee/Cross-Appellant New Orleans 2000 Partnership, *Board of Comm'rs* v. *Missouri Pac. R.R.*, No. 93-CA-0755, at 22 (La. Ct. App. filed June 3, 1993).

To be sure, the petition presents that issue more sharply than it was raised in the Court of Appeal, but that is merely because the constitutional issue is the only question presented to this Court. Under any fair reading of the argument as presented in the Court of Appeal, the valuation issue presented here was squarely presented below and therefore has been preserved for review here.[1]

2. It is not surprising that respondent employs the "waiver" crutch to avoid review of the decision below by this Court. Respondent's defense of the manifestly erroneous process by which petitioner was deprived of more than half of the fair market value of its property is completely conclusory and without merit. Respondent quotes

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[1] Petitioner also clearly presented this issue in federal constitutional terms to the Louisiana Supreme Court in its petition for certiorari. In arguing that the admission of impermissible estimates was an issue that warranted that court's review, petitioner argued that "implicit in the . . . Fifth and Fourteenth Amendments to the United States Constitution is the obligation of the governmental entity to act consistently with the constitutions' principles of complete compensation and compliance with all the procedural safeguards and substantive restrictions imposed on the exercise of expropriation." Application of New Orleans 2000 Partnership for Writ of Certiorari to Review the Ruling of the Court of Appeal, *Board of Comm'rs* v. *Missouri Pac. R.R.*, Nos. 93-C-3088, 3100, at 23 (La. filed Dec. 16, 1993). There can be no serious question that the state courts were presented with the constitutional issue that now must be resolved by this Court.

the trial judge's statement about the "tremendous amount of . . . evidence" presented at trial, but ignores the critical language in that analysis, which is that all of respondent's evidence "used a different date of valuation." Opp. 2-3. Not only was that date different; it was also constitutionally invalid under *Kirby*, which is precisely petitioner's point.[2] The jury was deluged with evidence that was irrelevant, as a constitutional matter, to the proper fair market value determination. That the jury's verdict represents an obvious compromise between estimates based on the correct date of valuation and estimates based on an illegal date of valuation, demonstrates that the process employed by the Louisiana state courts deprived petitioner of just compensation. In sum, respondent's argument simply begs the question of whether the procedure was constitutionally permissible in light of *Kirby*.

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[2] Respondent ultimately is forced to argue that a single, incredible statement made by its expert in rebuttal—that his market estimate would be unaffected by the property's ability to be used for gambling—is a sufficient basis upon which to allow a jury to ignore the only legally relevant estimates of the property's value. What makes exclusive reliance upon this one witness's bald statement particularly extraordinary is that since the petition was filed that witness, Jimmie Thorns, Jr., has been appointed to the Board of Commissioners of respondent. *See New Orleans Times-Picayune*, May 10, 1994, at C2.

Even giving the witness his due however, respondent assumes that somehow this point undermines certiorari when, in fact, it does no more than demonstrate the need for review. Petitioner's argument is that *Kirby* imposes a significant, constitutionally based requirement that "just compensation" be measured at the relevant time. This does not permit a governmental entity to put in evidence valuation estimates that are legally invalid and allow that evidence materially to reduce the just compensation verdict significantly below fair market value. Such a result would be rejected by both the Fourth and Federal Circuits and thus the decision of the Louisiana Court of Appeal that condones this departure from the requirement of just compensation warrants review by this Court.

As petitioner demonstrated in the petition, the proper approach under *Kirby* has been a matter of significant confusion and conflict among the lower courts. Pet. 16-20. Thus, as petitioner explained, both the Fourth and Federal Circuits have mandated methods of valuation that would have prevented the "compromise" verdict reached in this case that was based on constitutionally impermissible estimates of market value. See *United States* v. *69.1 Acres of Land*, 942 F.2d 290, 293 (4th Cir. 1991); *Yancey* v. *United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990). Respondent completely ignores this inconsistency in the holdings of the lower courts that have attempted to apply *Kirby*. It is, however, this problem in the law that justifies review by this Court of the decision below.

At the end of the day, this case presents a purely legal issue of the extent to which courts purporting to enforce the requirements of the Takings Clause can depart significantly from the norm of "just compensation" by permitting valuations that are improper under *Kirby* to be considered by the trier of fact. The only relevant evidence demonstrated without question that the property being taken had a value of at least $28 million. The only way to value this property at $13 million is to ignore its conceded "highest and best use" as a riverfront gambling facility. This is precisely what this Court's decision in *Kirby* forbids and what other federal courts would not countenance. Accordingly, the decision below should be reviewed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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